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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 246

THE UNITED STATES, PETITIONER

VS.

FORREST LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 2, 1938

CERTIORARI GRANTED OCTOBER 10, 1938

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES, PETITIONER

vs.

FOREST LUMBER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Court of Claims

No. L-391

FOREST LUMBER COMPANY, A CORPORATION, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed September 20, 1930

TO THE HONORABLE CHIEF JUSTICE AND THE JUDGES OF THE COURT OF CLAIMS:

The plaintiff, Forest Lumber Company, respectfully represents:

1. That the plaintiff is, and at the times hereafter referred to was, a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business in Kansas City, Missouri.

2. That on October 30, 1920, defendant, acting through the superintendent of the Klamath Indian School, under authority of the Act of Congress of June 25, 1910 (36 Stat. L., 866), entered into a contract with Williamson River Logging Company, a corporation of Chiloquin, Oregon, for the sale to said Williamson River Logging Company of all of the merchantable timber on a certain tract of land containing about sixty-seven thousand (67,000) acres, known as the Calinus Marsh Logging Unit and being a part of the Indian Reservation near Klamath Falls, Oregon, a copy of said contract marked "Exhibit A" being hereto attached and made a part hereof.

3. That on August 10th, 1926, plaintiff purchased this contract from Modoc Pine Company (which on March 19th, 1925, had purchased it from Williamson River Logging Company) and has been ever since then and is now the owner of same, said contract having been assigned to Modoc Pine Company by Williamson River Logging Company and to plaintiff by Modoc Pine Company by instruments bearing, respectively, the dates aforesaid and by and with the consent and approval of said superintendent of the Klamath Indian School.

4. That the provisions of said contract with respect to the price to be paid for said timber are as follows:

"For and in consideration of the agreements by the superintendent the purchaser agrees that prior to March 31, 1929, he will cut and remove all timber covered by this contract and will pay to the superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber at fixed rates per thousand feet, board

3 measure of Scribner Decimal G rule log scale, which rates for specified periods of the contract shall be as follows:

"(a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so-called 'bull pine'), sugar pine, and incense cedar; and one dollar and eighty-five cents for other species.

"(b) For each of the three year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936, such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described. * * *

"The purchaser further agrees that prior to the time when the stumpage value of the timber cut from both unallotted and allotted lands shall exceed the cash deposit of forty thousand dollars (\$40,000.00) submitted with his proposal to purchase timber, he will make another cash deposit of not less than ten thousand dollars (\$10,000.00) to cover further cutting and that he will make additional deposits of ten thousand dollars (\$10,000.00) each at such times as may be necessary to insure that the stumpage value of the timber cut and not paid for at any time shall not exceed the cash deposit then in the hands of the superintendent except that, subject to the requirements as to the maintenance of a constant credit balance, the last payment in any logging season may be in an amount not less than five thousand dollars (\$5,000.00)."

5. That the cash deposits required by said contract have been made from time to time.

4 6. That said contract provides a method for an adjustment by the Commissioner of Indian Affairs for the three-year period beginning April 1, 1924, the provisions of the contract in this respect being as follows:

"For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the superintendent and the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents (\$22.50) for yellow pine (including so-called 'bull pine'), sugar pine, and incense cedar, and seventeen dollars (\$17.00) for other species.

"In determining the stumpage rates to be designated for all timber scaled during the three-year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of twenty-two dollars and fifty cents (\$22.50) and seventeen dollars (\$17.00) stipulated in the preceding paragraph as basic values, and the cost of logging operations and lumber manufacture during the said three years will be compared with the cost of such operations

and manufacture during the three-year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three-year period directly preceding January 1, 1924.

"Any advance in stumpage prices prescribed by the Commissioner for the three-year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924. In the discretion of the Commissioner, a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit; PROVIDED THAT the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract."

7. That the Commissioner of Indian Affairs made no increase for the three-year period beginning April 1, 1924, leaving the prices for said three-year period to be those stated in the contract.

8. That the contract provides for stumpage price adjustments by the Commissioner of Indian Affairs for the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, the provisions of the contract in this respect being as follows:

6 "For the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936 readjustment of stumpage prices may be made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three-year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three-year period.

"Notice of the new schedules of prices shall be given the purchaser by letter not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon written request presented at least fifteen days before the date upon which the new stumpage rates are to become effective for any period."

9. That the Commissioner of Indian Affairs made no increase in the prices as stated in said contract for the year beginning April 1, 1927.

10. That the average mill run wholesale net value of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1927, did not exceed the average mill run wholesale net value of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924; and that on a com-

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parison of the value of \$22.50 for yellow pine (which, as used
7 herein, includes the so-called "bull pine," sugar pine, and
incense cedar), and \$17.00 for other species and the cost of
logging operations and lumber manufacture during the three years
directly preceding January 1, 1920, with the average mill run whole-
sale net value of lumber f. o. b. said mills and the cost of logging
operations and lumber manufacture during the three years directly
preceding January 1, 1927, it will be found that there had not been
generally in the lumber industry in the specified region an increase
in the margin of profit on logging and manufacturing operations
during the three-year period directly preceding January 1, 1927;
and that on a comparison of said value of said lumber and said cost of
logging operations and lumber manufacture during the year directly
preceding January 1, 1928, with the said value of said lumber and
said cost of logging operations and lumber manufacture for the
three years directly preceding January 1, 1927, it will be found that
there had not been generally in the lumber industry in the specified
region an increase in the margin of profit on logging and manufact-
uring operations during the year directly preceding January 1,
1928; and that on a comparison of said value of said lumber and
the cost of logging operation and lumber manufacture during the
year directly preceding January 1, 1929, with said value of said
lumber and said cost of logging operations and lumber manufac-
ture for the three years directly preceding January 1, 1927, or
the year directly preceding January 1, 1928, it will be found
8 that there had not been generally in the lumber industry in
the specified region an increase in the margin of profit on log-
ging and manufacturing operations during the year directly preced-
ing January 1, 1929.

11. That the Commissioner of Indian Affairs was unauthorized
and unwarranted under the terms and provisions of said contract
in making any increase in the price of yellow pine for the year
beginning April 1, 1928; but, nevertheless, prior to said date he
gave notice that he would make, and subsequently attempted to
make effective, an increase in the price of yellow pine under said
contract for the year beginning April 1, 1928, of \$40 per thousand
feet, making said price \$5.48 per thousand.

12. That plaintiff protested against said increase and against the
appropriation of any of the moneys then or thereafter deposited by
it under said contract for the payment of yellow pine at any price
in excess of \$5.08 per thousand feet but defendant refused to heed
such protest and appropriated moneys, deposited by the plaintiff,
at the rate of \$5.48 per thousand feet; that during said year the
plaintiff cut under said contract 57,483,082 feet of yellow pine, for
each thousand feet of which, over the protest of plaintiff, defendant
appropriated of plaintiff's money on deposit with it the sum of \$40
per thousand feet in excess of the amount which could rightfully
have been appropriated, or a total of twenty-two thousand, nine
hundred ninety-three and 23/100ths dollars (\$22,993.23).

9 13. That the Commissioner of Indian Affairs was unauthorized and unwarranted under the terms and provisions of said contract in making any increase in the price of yellow pine for the year beginning April 1, 1929; but nevertheless, prior to said date, he gave notice that he would make, and subsequently attempted to make effective, an increase in the price of yellow pine under said contract for the year beginning April 1, 1929, of \$.40 per thousand feet, making said price \$5.48 per thousand.

14. That plaintiff protested against said increase and against the appropriation of any of the moneys then or thereafter deposited by it under said contract for the payment of yellow pine at any price in excess of \$5.08 per thousand feet but defendant refused to heed such protest and appropriated moneys deposited by the plaintiff at the rate of \$5.48 per thousand feet; that during said year beginning April 1, 1929, plaintiff cut under said contract 54,448,480 feet of yellow pine, for each thousand feet of which, over the protest of plaintiff, defendant appropriated of plaintiff's moneys on deposit with it the sum of \$.40 per thousand feet in excess of the amount which could rightfully have been appropriated, or a total of twenty-one thousand, seven hundred seventy-nine and 39/100ths dollars (\$21,779.39).

15. That although restitution thereof has been demanded by plaintiff, defendant has refused, and still refuses, to return to plaintiff the said sums so unlawfully collected from it, which amount 10 in the aggregate to forty-four thousand, seven hundred seventy-two and 62/100ths dollars (\$44,772.62).

16. That plaintiff is a citizen of the United States and has at all times borne true allegiance to the government thereof and has not in any way aided, abetted, or given encouragement to any of the enemies of the said government, and that the facts as stated in this petition are true.

17. That no other action as aforesaid has been had on this claim in Congress or any other department of the government; that plaintiff is the sole owner of this claim, and the only person interested therein; that no assignment or transfer thereof, or any part thereof, or of any interest therein, has been made, and that plaintiff is fully entitled to the amount herein claimed from the United States after the allowance of all just credits and off-sets.

Wherefore, plaintiff prays judgment for said sum of forty-four thousand, seven hundred seventy-two and 62/100ths dollars (\$44,772.62), and such other and further relief as to the court plaintiff may appear to be entitled.

FOREST LUMBER COMPANY,
By R. B. WHITE, President.

CARL D. MATZ, Attorney for Plaintiff.

11. [Duly sworn to by Raymond B. White; jurat omitted in printing.]

12. Exhibit A to petition

DEPARTMENT OF THE INTERIOR, INDIAN SERVICE, FORESTRY BRANCH

TIMBER CONTRACT

Calimus-Marsh Unit:

This agreement entered into at Klamath Agency, Oregon, this 30th day of October, 1920, under authority of the Act of Congress of June 25, 1910 (36 Stat. L., 866, 857), between the Superintendent of the Klamath Indian School, hereinafter called the Superintendent, for and in behalf of the Klamath Tribe of Indians, party of the first part, and Williamson River Logging Company of Chiloquin, Oregon, party of the second part, hereinafter called the purchaser:

Witnesseth, That the Superintendent, in consideration of the agreement by the purchaser, agrees to sell to the purchaser upon the terms and conditions herein stated and the Indian Service General Timber Sale Regulations approved April 10, 1920, by the Assistant Secretary of the Interior and which are hereby made a part of this contract, all the merchantable dead timber, standing or fallen, and all the merchantable live timber marked or otherwise designated by the officer in charge for selecting logging as required by the General Timber Sale Regulations, comprising trees approximately eighteen inches and larger in diameter at a point four and one-half feet from the ground and estimated to be four hundred and fifty million feet, board measure, log scale, more or less, principally western yellow pine, including so called "bull pine" on the unallotted lands within a tract of about 67,000 acres, known as the Calimus-Marsh Logging Unit, and more particularly defined by a boundary line drawn as follows:

Beginning at the north quarter corner of Section 36, Township 32 South, Range 7 East, thence east along section lines to the point on the divide on the north line of Section 35, Township 32 South, Range 8 East, which is the northeast corner of the Solomon Butte Logging Unit; thence southerly along east boundary of the said Solomon Butte Logging Unit to the center quarter corner of Section 25, Township 33 South, Range 8 East, thence due east along the divide to the center quarter corner of Section 29, Township 33 South, Range 9 East; thence following the divide north one-half mile, thence east to the southwest corner of Section 23, Township 33 South, Range 9 East, thence north one-half mile, thence east to the east quarter corner of said Section 23, thence in an easterly and southerly direction along the divide through Sections 24 and 25, Township 33 South, Range 9 East, Sections 30 and 31, Township 33 South, Range 10 East, and Sections 6 and 7, Township 34 South, Range 10 East, to the top of Calimus Butte, thence east along section line crossing top of said

butte to the southwest corner of Section 9; Township 34 South, Range 10 East, thence northerly and northeasterly along the divide to the middle quarter corner of Section 27, Township 33 South, Range 10 East; thence northerly and northwesterly along this divide to the north quarter corner of Section 2, Township 32 South, Range 9 East; thence northwest along the divide to a point in Klamath Marsh near the north sixteenth corner of the southwest quarter of Section 9, Township 32 South, Range 9 East; thence westerly and south-
14 westerly along edge of said Klamath Marsh and of the Williamson River to the point of beginning.

And authorizes the purchaser to enter into separate contracts with Indians holding trust patented allotments within the limits of the area above defined (comprising about 2,500 acres with an estimated stand of about fourteen million feet) for the purchase of their timber subject to Indian Service regulations and according to the terms of this general contract and the General Timber Sale Regulations approved April 10, 1920.

For and in consideration of the agreements by the Superintendent the purchaser agrees that prior to March 31, 1939, he will cut and remove all timber covered by this Contract and will pay to the Superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber at fixed rates per thousand feet, board measure of Scribner Decimal C rule log scale, which rates per specified periods of the contract shall be as follows:

(a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so called "bull pine"), sugar pine, and incense cedar; and one dollar and eighty-five cents, for other species.

(b) For each of the three-year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936, such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

The purchaser further agrees that within six months from
15 the date of approval of this contract he will enter into approved separate contracts of purchase with such Indians holding trust patented allotments within the above defined tracts as desired to sell their timber and that he will pay to the Superintendent in trust for such Indians the full value of the allotted timber covered by such contracts at the prices stipulated for unallotted timber and subject to the same regulations and the provisions as to the periodic increases in price; and he also agrees that within thirty days from the approval of the contract on any allotment he will pay ten per cent of the estimated value of the timber thereon as an advance payment; and further that within three years of the approval of such contract he will pay an additional fifteen per cent of the estimated value of the timber thereon as an advance payment.

The purchaser further agrees that prior to the time when the stumpage value of the timber cut from both unallotted and allotted lands shall exceed the cash deposit of forty thousand dollars (\$40,000.00) submitted with his proposal to purchase timber, he will make another cash deposit of not less than ten thousand dollars (\$10,000.00) to cover further cutting, and that he will make additional deposits of \$10,000.00 each at such times as may be necessary to insure that the stumpage value of the timber cut and not paid for at any time shall not exceed the cash deposit then in the hands of the Superintendent, except that, subject to the requirements as to the maintenance of a constant credit balance, the last payment in any logging season may be in an amount not less than \$5,000.00.

16 The purchaser further agrees that he will cut and remove from some portion of the sale area, including allotments, at least twenty-five million feet board measure, log scale, prior to March 31, 1922, and not less than twenty-five million feet during each twelve months thereafter until the contract is completed; that he will remove and pay for, as merchantable timber, pieces ten feet and longer, will utilize the trees to a diameter of eight inches in the tops where straight and sound, and will pay for all logs on the basis of a scale recognizing sixteen feet as the maximum length of a single log; that all timber will be considered merchantable as provided for in the attached regulations, except that red and white fir must be one-half or more sound; and that he will conform with all requirements of the Indian Service General Timber Sale Regulations.

If the purchaser of this unit shall be the purchaser also of other units of timber on the Klamath Indian Reservation, logging performed by him on his other logging units will be accepted as performance on this contract provided the total minimum cut required by all his contracts is performed and provided he completes this contract within the period named but subject to the provisions of paragraph nine of the General Timber Sale Regulations.

For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the Superintendent and the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents (\$22.50) for yellow pine (including so called "bull pine"), sugar pine and incense cedar, and seventeen dollars (\$17.00) for other species.

17 In determining the stumpage rates to be designated for all timber scaled during the three year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of \$22.50 and \$17.00 stipulated in the preceding

paragraph as basic values, and the cost of logging operations and lumber manufacture during the said three years will be compared with the cost of such operations and manufacture during the three year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three year period directly preceding January 1, 1924.

Any advance in stumpage prices prescribed by the Commissioner for the three year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924. In the discretion of the Commissioner a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit; provided that the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract.

For the three year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, readjustment of stumpage prices may be made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three year period.

Notice of the new schedules of prices shall be given the purchaser by letter not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs a hearing will be afforded the purchaser upon written request presented at least fifteen days before the date upon which the new stumpage rates are to become effective for any period.

It is further understood and agreed that this contract shall be null and void and of no effect until approved by the Secretary of the Interior and until the latter shall approve a bond of the purchaser in the penal sum of fifty thousand dollars (\$50,000.00) conditioned on the faithful performance of all the terms of this contract and the regulations attached hereunto.

Signed and sealed in quadruplicate this thirtieth day of October 1920.

WILLIAMSON RIVER LOGGING COMPANY,

Purchaser.

Witnesses:

WALTER G. WEST, *Superintendent.*

F. M. GOODWIN, *Assistant Secretary.*

II. *History of proceedings*

On October 30, 1930, the defendant filed a general traverse to plaintiff's position.

On April 25, 1934, the defendant filed a motion for leave to withdraw the general traverse and file a plea to the jurisdiction in lieu thereof.

Said motion was allowed by the court June 12, 1934, and, on the same day the defendant filed a plea to the jurisdiction.

On November 5, 1934, the plea to the jurisdiction was argued and submitted.

On December 3, 1934, the court entered the following order on said plea:

ORDER

This case comes before the court on the defendant's plea to the jurisdiction of the court. Upon consideration thereof it is ordered this 3d day of December 1934, that said plea be and the same is overruled without prejudice.

After the overruling of the defendant's plea to the jurisdiction no other answer by the defendant was filed.

III. *Argument and submission of case*

On October 8, 1937, this case was argued and submitted on merits by Mr. Carl D. Matz and Mr. William S. Bennet, for plaintiff, and by Mr. James J. Sweeney, for defendant.

20 IV. *Special findings of fact, conclusions of law, and opinion of the court by Williams, J.*

Filed January 12, 1938

Messrs. Carl D. Matz and William S. Bennet for the plaintiff. Mr. Jesse Andrews was on the briefs.

Mr. James J. Sweeney, with whom was Mr. Assistant Attorney General Sam E. Whitaker, for the defendant.

The court, upon the report of a commissioner and the evidence, makes the following

Special findings of fact

1. Forest Lumber Company, plaintiff, is a corporation organized under the laws of the State of Delaware, with its principal place of business in Kansas City, Missouri.

2. On August 10, 1920, the Assistant Secretary of the Interior approved a form of contract, pertinent regulations, and a form of advertisement for the sale of approximately 450,000,000 feet of timber, principally Western yellow pine. It was located on about 67,000 acres within Townships 31, 32, 33, and 34, Ranges 8, 9, and 10, William-

ette meridian, on what was known as Calimus-Marsh Unit, Klamath Indian Reservation, Oregon. Included as a part of the total quantity of timber on the Calimus-Marsh Unit was about 14,000,000 feet of timber, on about 2,500 acres of allotted land, as to which, prospective bidders were informed, separately approved contracts, with the Indian owners, might probably be made. The form of contract, as approved, provided that it would continue in effect until March 31, 1939.

21 The advertisement required that sealed bids, in duplicate, be addressed to the Klamath Indian School, Klamath Agency, Oregon. Bids were to be received until 2 o'clock p. m., Pacific Time, on October 27, 1920. Each bidder was required to state in his bid the price that he would pay per M for yellow pine, sugar pine, incense cedar, and for other kinds of timber to be cut and scaled prior to April 1, 1924. The advertisement prescribed that prices subsequent to that date were to be fixed by the Commissioner of Indian Affairs for three-year periods. Prospective bidders were informed that no bid less than \$4.00 for yellow pine, sugar pine, and incense cedar, and no less than \$1.60 for other species, during the period ending March 31, 1924, would be considered. Each bid was to be accompanied by a certified check, on a solvent National Bank, drawn in favor of the Superintendent of the Klamath Indian School, in the amount of \$40,000.

3. On October 26, 1920, Williamson River Logging Company, in response to said published invitation for bids, made its proposal, addressed to the Superintendent, Klamath Indian School, Klamath Agency, Oregon, for the purchase of yellow pine, sugar pine, and incense cedar at \$5.08 per M. feet, and for all other species at \$1.85 per M feet. A certified check in the sum of \$40,000, drawn on the First National Bank of Klamath Falls, Oregon, payable to the Superintendent of the Klamath Indian School, accompanied the proposal. The proposal provided that in the event the Williamson River Logging Company failed to fulfill its agreement the amount of the check would be retained as liquidated damages, for the use and benefit of the Klamath Indians.

On October 30, 1920, a contract was signed by Williamson River Logging Company. On July 25, 1922, it was approved by the Assistant Secretary of the Interior.

4. On March 19, 1925, Modoc Pine Company acquired this contract by assignment from Williamson River Logging Company. On April 3, 1925, the assignment of the contract from the Williamson River Logging Company to the Modoc Pine Company was approved by the Superintendent of the Klamath Agency, Oregon, and on April 22, 1925, said assignment was approved by the Assistant Secretary of the Interior.

On August 10, 1926, Forest Lumber Company, plaintiff herein, acquired the contract by assignment from the Modoc Pine Company. The assignment of the contract by the Modoc Pine Company to the Forest Lumber Company was approved by the Superintendent of

the Klamath Agency, Klamath, Oregon, on December 27, 1926, and by the Assistant Secretary of the Interior on January 14, 1927.

Under the contract, the Superintendent agreed to sell to the party of the second part all the merchantable dead timber, standing or fallen, and all the merchantable live timber marked or otherwise designated by the officer in charge for selective logging, as required by the General Timber Sale Regulations, estimated to be about 450,000,000 feet board measure, log scale, more or less, principally Western yellow pine, including so-called bull pine, on the unallotted lands within a tract of about 67,000 acres, known as the Calimus-Marsh Logging Unit within the Klamath Indian Reservation.

5. Said timber contract authorized the purchaser to enter into separate contracts with Indians holding trust patented allotments within the tract known as the Calimus-Marsh Logging Unit, for the purchase of their timber, subject to Indian Service regulations, and according to the terms of this general contract and the general timber sale regulations approved April 10, 1920.

Under the contract, the party of the second part agreed that prior to March 31, 1939, it would cut and remove all timber covered by the contract and pay to the Superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the timber as should be determined by the actual scale of the timber at fixed rates per thousand feet, board measure, of Scribner Decimal C rule log scale.

Certain provisions of the contract are as follows:

"This agreement entered into at Klamath Agency, Oregon, this 30th day of October 1920, under authority of the Act of Congress of June 25, 1910 (36 Stat. L., 855, 857), between the Superintendent of the Klamath Indian School; hereinafter called the superintendent, for and in behalf of the Klamath Tribe of Indians, party of 23 the first part, and Williamson River Logging Company, of Chiloquin, Oregon, party of the second part, hereinafter called the purchaser: * * *

"For and in consideration of the agreements by the Superintendent the purchaser agrees that prior to March 31, 1939, he will cut and remove all timber covered by this Contract and will pay to the Superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual sale of the timber at fixed rates per thousand feet, board measure of Scribner Decimal C rule log scale, which rates per specified periods of the contract shall be as follows:

"(a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so-called bull pine), sugar pine, and incense cedar; and one dollar and eighty-five cents for other species.

"(b) For each of the three year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936 such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

"For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the Superintendent and the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents (\$22.50) for yellowpine (including the so-called 'bull-pine'), sugar pine, and incense cedar, and seventeen dollars (\$17.00) for other species.

"In determining the stumpage rates to be designated for all timber sealed during the three year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of \$22.50 and \$17.00 stipulated in the preceding paragraph as basic values, and the cost of logging operations and lumber manufacture during the said three years will be compared with the cost of such operations and manufacture during the three year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three year period directly preceding January 1, 1924.

"An advance in stumpage prices prescribed by the Commissioner for the three year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924. In the discretion of the Commissioner a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit: Provided, That the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract.

"For the three year periods of the contract beginning April 1, 1927, 1930, and 1933, and 1936, readjustment of stumpage prices may be made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three year period.

"Notice of the new schedules of prices shall be given the purchaser by letter not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs a hearing will be afforded the purchaser upon written request presented at least fifteen days before the date upon which the new stumpage rates are to become effective for any period."

6: On June 28, 1922, and in conformity with the provisions of the contract, the Williamson River Logging Company furnished its bond in the penal sum of \$50,000 to guarantee its faithful performance of the contract.

7. The first price adjustment period under the contract commenced April 1, 1924.

The Williamson River Logging Company experienced delays in commencing operations under its contract. On April 20, 1921, the company requested the Commissioner of Indian Affairs to grant it an extension of one year within which to begin cutting timber under its contract. In a separate letter to the Commissioner on April 20, 1921, the company applied for an extension of 90 days from that date within which to file the bond required to guarantee performances of the contract. In its letters the company stated the extensions of time requested were necessary because of the then existing financial crisis which made it impossible for the company to obtain the necessary funds to extend its railroad facilities into the timber or to operate its sawmills. Its efforts to obtain suitable bondsmen were unavailing.

On April 23, 1921, the Commissioner, in a letter approved by the Assistant Secretary of the Interior, advised the company that his office was aware of the unusual financial conditions and the marked depression in the lumber market; that his office had no desire to insist upon a strict compliance with the terms of the contract that might result in loss to the company, and ultimately prove disadvantageous to the interests of the Indians; that he would waive the requirement of the contract respecting the quantities of timber to be cut prior to March 31, 1922, but desired that a properly executed and sufficient bond be filed at an early date. The company did not furnish the bond to guarantee performance of the contract until June 28, 1922. The bond and the contract were approved by the Assistant Secretary of the Interior on July 25, 1922.

On May 8, 1923, the attorney for Williamson River Logging Company addressed a lengthy letter to the Commissioner of Indian Affairs relative to the right of way for its logging railroad then under construction. This letter referred to the provisions of the Regulations forming a part of the timber purchase contract, and requested the Commissioner, in order to carry out the letter and spirit of the contract, to require the Central Pacific Railroad, in the construction of its railroad north of Kirk, Oregon, to permit the crossing of its right of way by logging railroads, particularly the railroad of Williamson River Logging Company, where necessary, and to construct such necessary crossings at its own expense.

The company in its letter advised the Commissioner that it had already expended \$122,000 in construction work on its railroad line, and that before completion of the main line it would have to expend at least an additional \$100,000, not counting the construction of any crossing of the Central Pacific Railroad,

north of Kirk; that it was incumbent upon the Indian Service to see that contractors were not burdened with construction and operating costs, when it was within the power of the Indian Service to aid the contractor, to the ultimate profit of the Klamath Indians; that litigation might result in financial embarrassment to the company and prevent it from fulfilling its contract, at considerable loss to the Indians; that the Klamath Tribe was in need of funds, and under the contract would receive in excess of \$2,000,000, whereas the sale of the right of way to the Central Pacific would not bring into the tribal funds more than \$1,000; that the company should be given a preferential right of way over the right of way of the Central Pacific, and aided in every way so that its contract might be complied with and the Indians derive the greatest revenue from the sale of their tribal and individual timber.

The company had failed to cut the minimum quantities of timber called for by the contract for the period ending March 31, 1923. On May 18, 1923, the company, in a letter to the Commissioner, protested respecting the conditions sought to be imposed by the Superintendent of the Klamath Agency in connection with making up the deficit in cutting the minimum quantities of timber under the contract.

The company continued to suffer from conditions that prevented performance of the contract and in a letter of September 1, 1924, expressed to the Superintendent of the Klamath Agency its regret that conditions up to that time had prevented any operation in the Calimus-Marsh Unit during that contract year. The company failed to cut any timber during the contract year ending March 31, 1925, and advanced a special deposit of \$5,000 on account of its previous delinquency for the year ending March 31, 1923.

8. Early in 1925 the properties of the Williamson River Logging Company were taken over by the Modoc Pine Company. On March 19, 1925, the president of the Modoc Pine Company wrote to the Commissioner of Indian Affairs advising that the Williamson River Logging Company had assigned to the Modoc Pine Company, subject to the approval of the Superintendent of the Klamath Indian School and the Secretary of the Interior, the timber purchase agreement dated October 30, 1920, and that owing to the depressed conditions of the lumber market the Williamson River Logging Company did not operate in 1924 and that, accordingly, on March 31, 1925, there would be due and payable under the contract the sum of \$127,000, representing the selling price of 25,000,000 feet of timber at \$5.08 per M feet. The Modoc Pine Company requested that the payment of that sum be postponed upon such terms and conditions as might seem proper to the Bureau of Indian Affairs. The president of the Modoc Pine Company in his letter to the Commissioner, also pointed out that operations of the Williamson River Logging Company for the years 1921, 1922, 1923, and 1924 had shown a net loss of about \$287,000. He also stated that the Modoc Pine Com-

pany stood ready to meet such requirements as might be made by the Office of Indian Affairs, and felt that the Commissioner would agree that the reorganization of the enterprise was in the best interests of the Klamath Indians.

On April 23, 1925, the Assistant Commissioner telegraphed the Superintendent of the Klamath Reservation:

"Advise Modoc Pine Company assignments and bond Williamson River Logging Company contract approved.

On April 22, 1925, the Assistant Secretary of the Interior approved a recommendation by the Assistant Commissioner of Indian Affairs to the effect that the Modoc Pine Company should be required to make immediate payment of \$25,000, to be held until past delinquencies in the cutting of required quantities of timber under the contract had been cut and paid for.

On May 27, 1925, the Modoc Pine Company, in a letter to the Superintendent of the Klamath Agency, advised that the requirements of the Indian Office respecting the failure of the Williamson River Logging Company to cut the required minimum quantities of timber under the contract had been reasonable, but the recent destruction by fire of the Company's sawmill made it impossible

28 to make up the required deficit in cutting. The Superintendent was asked to recommend that the Commissioner of Indian Affairs not require the Company to make the special deposit of \$25,000 and, also, to waive the requirement that the Company make up the deficit in the cutting of timber under the contract. The letter contained the following:

"We are fully aware that your entire concern in this and other matters is for the Klamath Tribe of Indians * * *. Only a successful operation on the reservation can be of the greatest benefit to those you represent."

On July 6, 1925, the Assistant Secretary of the Interior approved the recommendation of Commissioner Burk to the effect that, because of the efforts made by the Modoc Pine Company to perform the contract and the recent destruction of its sawmill by fire, the company be relieved from the payment of the special deposit of \$25,000, and also the requirement of making up the deficit that accrued under the contract for the period ending March 31, 1925.

On August 10, 1926, the Modoc Pine Company assigned the contract of October 30, 1920, to the Forest Lumber Company. On January 14, 1927, the Assistant Secretary of the Interior approved the recommendation of Commissioner Burke that the Department approve the assignment by the Modoc Pine Company, the acceptance by the Forest Lumber Company, and the bond furnished by the Forest Lumber Company.

9. The second price adjustment period under the contract commenced April 1, 1927.

On February 25, 1927, the Commissioner addressed a telegram to the Forest Lumber Company as follows:

"Stumpage price yellow and sugar pine, Calimus-Marsh Unit, increased one dollar per thousand to become effective April first, nineteen twenty eight."

On April 2, 1927, plaintiff wrote to the Commissioner respecting his action in notifying it that the price of yellow and sugar pine for the adjustment period beginning April 1, 1927, would be increased \$1.00 per thousand, but not effective until April 1, 1928. Plaintiff said that on the basis of the then stumpage price of \$5.08 per thousand it had lost \$1.02 per thousand for the year 1926 and, in addition, \$75,000 in inventory, due to shrinkage in the value of lumber in the yard; that there was nothing in the then present market situation to justify the increase in stumpage made on the Calimus-Marsh Unit and other units in the Klamath Indian Reservation, and requested that it be accorded a hearing.

In a telegram of January 19, 1928, to the Commissioner, plaintiff said that it felt that any increase in the stumpage price under the contract was absolutely unjustified; that analysis had shown that the balance of the timber was of poorer quality; that it was more scattered, required greater logging cost, and consisted of smaller sizes than timber already logged; that log average for 1927 was only 267 feet as compared with 311 feet the previous year; that it had produced 10 per cent more number three shop and lower grades in 1927 than during the previous year; that its 1927 cut was 15.8 per cent under the Government cruise; that in 1926 it lost over \$1.00 per thousand, in spite of its logging cost being lower than average Indian lumber operator; that it cut only one and one-half million feet per mile of railroad in 1927 as compared to two and one-half million feet in 1926; that its logging superintendent and managers estimated that logging conditions and timber would be worse from then on and that logging costs would be \$2.00 or more per thousand higher than on timber already cut; that actual loss on whole operations for 1927 could be over \$2.00 per thousand. Plaintiff asked the Commissioner, in view of the above, he could advise that there would be no increase in stumpage for the three year period ending March 31, 1930; not, that plaintiff be given a hearing on January 27.

On the following day the Commissioner wired plaintiff's president that he would be pleased to hear him on January 27, regarding the Klamath contract.

10. On February 2, 1928, the Commissioner wrote to Superintendent Arnold, of the Klamath Agency, concerning a conversation with Mr. White, president of plaintiff company, respecting conditions affecting the contract, and requested that the data submitted by Mr. White be studied and that a report be furnished the Commissioner. Said letter contained the following statement:

"While the Office does not concede that the arguments presented demonstrate that an increase in price is not justifiable, it is readily admitted that the amount of timber that may be obtained from each mile of railway built within the Unit has a very direct bearing on the value of the stumpage within such Unit."

During the early part of 1928 there was considerable correspondence between plaintiff and the Commissioner of Indian Affairs respecting the general surrounding conditions, and the quality and quantity of timber cut and to be cut on the Calimus-Marsh Unit. Plaintiff insisted that conditions as actually encountered disclosed that there was a considerable under-run, and that it was obtaining a smaller percentage of number two shop and better grades than it had expected to cut from the unit.

On March 16, 1928, the Commissioner telegraphed plaintiff that the Muck report would not be received before March 22, 1928, and suggested a conference during the week beginning March 26, 1928, if plaintiff desired a hearing respecting Klamath timber.

On March 24, 1928, the Commissioner addressed the following telegram to plaintiff:

"Increase one dollar price yellow pine Calimus-Marsh Unit reduced to forty cents effective April first, nineteen twenty eight can hear you any day between twenty sixth and thirtieth data furnished superintendent and Muck has been considered."

On August 30, 1928, plaintiff wrote to the Commissioner respecting his final action in increasing the stumpage price of yellow pine, sugar pine, and incense cedar by 40¢ per thousand feet, effective April 1, 1928. Plaintiff stated that it felt that no increase was justified for that year; that it had made the cash deposits to cover cutting of the timber, as called for by the contract, because it did not wish to subject itself to the liability of the contract being cancelled; that no part of the deposits made should be applied, or should have
31 been applied to the payment of stumpage at a rate in excess of \$5.08 for yellow and sugar pines, and incense cedar; that it should be permitted to cut the timber during the remainder of the year at the contract rates. Plaintiff also gave notice that its protest was to be a continuing one, and that if payments were made at a rate greater than those specified in the contract for the respective species of timber, it would take such steps as might be necessary to recover from the Government the excess amount so paid. On September 10, 1928, plaintiff's letter was forwarded by the Commissioner to Superintendent Arnold, Mr. Kinney, and Mr. Muck, for report.

11. On October 26, 1928, Mr. Muck, Forest Valuation Engineer, and Mr. Kinney, Chief Supervisor of Forests, in a report prepared at the Klamath Indian Agency, Klamath, Oregon, and addressed to the Commissioner of Indian Affairs, stated that full consideration had been given to the facts and arguments presented by the plaintiff prior to April 1, 1928, and that every possible concession under the terms of the contract had been granted before final action was taken and the conservative increase of 40¢ per thousand made effective; that statements of the Forest Lumber Company for the year 1928 would not be available prior to February 1, 1929; that it was not believed the results from the operations would show the increased

stumpage price had been a serious burden; that in the Muck report of March 15, 1928, entitled "The Revaluation of the Timber under Contract on the Klamath Indian Reservation, Oregon," it was pointed out that the cost of logs, inclusive of stumpage at the Forest Lumber Company mill at Pine Ridge, Oregon, was very reasonable when compared with the district at large; that this log cost was not a material contributing factor to the losses reflected by the Company's operations during the years 1926 and 1927; that it was believed that this condition would continue during the year 1928, for the reason that there had been no material change in the factors involved, and that the conservative price increase of 40¢ could not possibly operate to impose a serious burden on the purchaser; that the reason for the unfavorable showing by the plaintiff at Pine Ridge was one of overinvestment in mill and plant, and unbalanced ratio between fixed capital and production; that these considerations could not be permitted to involve the value of timber on the Calimus-Marsh Unit; that the revaluation of the timber under the contract was based on the general rise in value which had taken place in this competitive field, and was essential for the protection of the Klamath Indians, and fully justified in the light of existing conditions; that the action respecting the increased stumpage price, effective April 1, 1928, was subsequently supported by the favorable trend in the lumber market which had occurred during the preceding six months; that the industry was making substantial progress; that the volume of business had increased materially, and that there had been a strengthening of price levels; that according to reports of the California White and Sugar Pine Manufacturers Association, production in Northern California and Southern Oregon showed an increase of over 12 per cent over the year prior, and that orders showed an increase of over 5 per cent; that orders exceeded production, and that many mills were booked far ahead; that the price of number two shop which had averaged \$26.70 during 1927 had increased to \$27.85 at the then present writing—in fact, that there had been a general upward trend in practically all grades, and that the average price of pine lumber f. o. b. mills in Southern Oregon and Northern California had advanced at least \$1.00 per thousand over one year prior; that the outlook was generally favorable, and that the industry was in a more substantial position than had obtained during the preceding two years; that no action appeared necessary at the then present writing, and it was recommended that the matter be held in abeyance until after the first of the approaching year; that if an investigation of facts then available should show the increase effective April 1, 1928, to have been a burden on the Forest Lumber Company, the Commissioner, under the terms of the contract, would have discretion to relieve the purchaser of a part or all of the increase of 40¢ per thousand.

12. On May 23, 1929, plaintiff wrote to the Commissioner that it desired to renew the protest made by it on August 30, 1928,

33 against the increase of 40¢ per thousand feet for yellow pine (including so-called "bull pine"), sugar pine, and incense cedar, on the Calimus-Marsh Unit, under the contract of October 30, 1920, as to all deposits made or to be made during the year 1929.

During the year 1929 several letters passed between the Superintendent of the Klamath Agency and the Commissioner concerning plaintiff's complaint made early in 1928 to the effect that it had sustained an exceptionally low under-run on the Calimus-Marsh Unit. The Commissioner was advised by the Superintendent that he found that the company received a fair over-run, as compared with the over-run received at the different mills in that region; that the Service had been fair in its scaling methods, and that the low over-run was not due to the methods used by the Indian Service in the scaling of the timber but was due more to the manner in which over-run was computed by the Forest Lumber Company.

13. The third price adjustment period under the contract commenced April 1, 1930.

On January 11, 1930, the Commissioner forwarded to Superintendent Arnold, of the Klamath Indian Reservation, certain exhibits and reports that had been filed by the plaintiff at a hearing before the Assistant Secretary upon an appeal from the requirements of the Commissioner of Indian Affairs that the price of yellow pine on the Calimus-Marsh Unit be increased 40¢, effective April 1, 1928. The reports dealt with the quality of the timber, the topography, logging conditions, and costs experienced by the company. The Superintendent was advised that the Commissioner had forwarded to Mr. Muck, Forest Valuation Engineer, a copy of said letter and copies of the reports prepared by plaintiff's representatives; that it would be impracticable for Mr. Muck to make an examination of the Calimus-Marsh area, and requested that a full report respecting conditions on this area be prepared by the forestry employees at Klamath Agency and forwarded to Mr. Muck for his consideration and submission with his report to the Commissioner in connection with the next readjustment of stumpage prices on the Calimus-Marsh Unit on April 1, 1930.

34. On January 11, 1930, the Commissioner forwarded to Mr.

Muck, Forest Valuation Engineer, copies of the pertinent letter and reports, and directed that in his study of readjustment of stumpage prices on the Klamath Reservation, effective April 1, 1930, special consideration be given to the claim of the Forest Lumber Company that the timber remaining on the Calimus-Marsh Unit was inferior in quality, and that conditions were such that a stumpage price in excess of the original price of \$5.08 per thousand on yellow pine could not be justified.

On February 15, 1930, the Commissioner wrote to plaintiff, advising that the third readjustment of stumpage prices on the Calimus-Marsh Unit would occur on April 1, 1930, and that the contract required notice of any increase to be given March 1, 1930; that there

had been so much delay on the part of the lumber companies in the Klamath District in furnishing financial statements that it would be difficult to make a complete study of the same in order that notice might be given prior to March 1st. Plaintiff was asked to advise whether it would consent to notice respecting possible price increases any time prior to April 1, 1930.

On February 26, 1930, plaintiff by telegram informed the Commissioner that it desired that he be fully informed as to the Company's situation before reaching his conclusion, and that it consented to notice being given it any time prior to April 1; that it was sure the Commissioner would bear in mind what had occurred at the hearing before First Assistant Secretary Dixon on the preceding December fifteenth.

14. On February 26, 1930, the Commissioner addressed the following telegram to plaintiff:

"There will be no increase on April first on Calimus Marsh unit above stumpage prices of five dollars and forty-eight cents and one dollar and eighty-five cents now being paid you will be advised later whether further study seems to justify a reduction on yellow pine, sugar pine, and incense cedar."

35 On February 27, 1930, the Commissioner addressed a letter to Superintendent Arnold of the Klamath Agency, and enclosed copies to Mr. Muck, Forest Valuation Engineer, and James A. Haworth, Jr., lumber man at large, concerning the readjustment of stumpage prices under the contract. He stated that no increase was made on April 1, 1924, but for the second period beginning April 1, 1927, an increase of 40¢ was made effective, but that the purchaser was relieved from the payment of any increase beginning April 1, 1927; that a preliminary report by Mr. Muck, Forest Valuation Engineer, dated February 21, 1930, and concurred in by Mr. Haworth, recommended that no increase be made over the \$5.48 per thousand feet for yellow pine, sugar pine, and incense cedar, and \$1.85 for other species during the three-year period beginning April 1, 1930. He stated that a memorandum concurring in the recommendation, and signed by William H. Zeh, Supervisor of Forests at Klamath, and Superintendent Arnold, was on file; that Mr. J. P. Kinney, Chief Supervisor of Forests, and familiar with the history of the contract and the sale area, and who had reviewed the several financial statements submitted by Mr. Muck, also concurred in the view that an increase above the then present prices could not be justified; that a full report on the Klamath situation could not be presented by Mr. Muck at that time because of the failure of several lumber companies operating in the Klamath District to furnish their financial statements; that the Forest Lumber Company had urged a reduction in the price of yellow pine, sugar pine, and incense cedar to the price of \$5.08, originally bid; that financial reports from other operators, and a full report on the re-cruise of the timber on the Calimus Marsh Unit must be received and carefully analyzed before

a determination could be reached as to whether the requested reduction in price could be made. In the letter the Superintendent was directed to advise the Forest Lumber Company that the stumpage price for yellow pine, sugar pine, and incense cedar cut after March 31, 1930, would be \$5.48, unless the investigation of the special conditions obtaining on the Calimus-Marsh should show that a reduction from the price of \$5.48 was justifiable; and that the investigation would be completed at the earliest practicable date and notice given him in order that he might inform the Forest Lumber Company of any reduction in price.

15. On April 8, 1930, plaintiff in a letter to the Commissioner of Indian Affairs expressed the hope that the investigation then being made would be completed at an early date, and the results would justify a reduction as requested by it; that conditions in the California market were quite bad, the market having dropped about \$3.00 to \$3.50 per thousand since early last fall; that it seemed certain that plaintiff was faced with a substantial loss in its operation for that year; that it assumed the relief, if granted, would be effective from the date the increased price was first made.

On April 29, 1930, the Commissioner addressed a letter to the plaintiff, which letter was approved by Assistant Secretary of the Interior Joseph M. Dixon on May 1, 1930, advising that after a re-cruise of the timber and a thorough examination of all factors connected with logging operations and quality of timber remaining on the Unit the conclusion had been reached that the interests of the Klamath Indians would be fully protected through a reduction of 40¢ from the existing price, effective April 1, 1930; that this reduction was made because plaintiff had established that the timber remaining on the Unit was of inferior quality; that logging would be comparatively expensive; that because of the damage to the timber by fire and insects the volume to be obtained from the remaining area of the Calimus-Marsh Unit was substantially below the volume as shown on the original cruise. The letter concluded:

"This action does not operate to relieve the Forest Lumber Company from the increase of 40¢ per thousand feet on the species above named that was effective from April 1, 1928, to April 1, 1930."

On May 6, 1930, Superintendent Arnold of the Klamath Agency in a letter to plaintiff advised that he had received notice from the Commissioner of Indian Affairs that the company had been granted a reduction in the stumpage price of yellow pine, sugar pine, and incense cedar on the Calimus-Marsh Unit from \$5.48 to \$5.08, effective April 1, 1930; that a credit would be allowed Forest Lumber Company on all deposits for timber scaled after April 1, 1930;

37 that the report mailed to plaintiff covering timber scaled during the month of April 1930, showed that the footage of yellow pine scaled was 5,090,350 feet; that a reduction of 40¢ per thousand on this footage amounted to \$2,036.14; and that an entry had been made on the Klamath Agency records crediting the company's

account and increasing its advanced deposit balance by that amount.

16. On May 7, 1930, plaintiff wrote to the Commissioner that it appreciated his action in reducing the stumpage price of yellow pine, sugar pine, and incense cedar, from \$5.48 to \$5.08 per thousand effective April 1, 1930, but was disappointed to learn that he did not see fit to make the price reduction effective from April 1, 1928; that it felt that the showing made by it in its petition and conference justified the reduction of 40¢ to be made effective as of April 1, 1928, not only on account of the extremely unfavorable conditions on that unit, but also on account of the comparative values of lumber for the periods, as outlined in the contract. Plaintiff requested the Commissioner to again review the matter and advise whether he did not feel it proper to make the reduced price effective as of April 1, 1928.

On June 3, 1930, the Commissioner replied to plaintiff's letter of May 7, 1930, and advised that he was unwilling to make a reduction in price for the two years ending March 31, 1930.

On July 20, 1932, plaintiff requested the Commissioner to relieve it from cutting the minimum quantity of timber under the contract for the year ending March 31, 1933. The action thereon by the Commissioner in granting plaintiff's request was approved by First Assistant Secretary of the Interior Joseph M. Dixon, July 29, 1932.

Acting under authority of the act of June 25, 1910 (36 Stat. 855, 857), the act of March 4, 1933 (47 Stat. 1568), and the act of June 16, 1933 (48 Stat. 311), the original contract of October 30, 1920, was modified to provide for the reduction of the price of yellow pine (including so-called "bull pine") and sugar pine to \$3.00. The prices of other species were also reduced.

The original contract as modified by the agreement of February 21, 1934, left plaintiff until March 31, 1939, to perform its contract.

17. From April 1, 1928, to March 31, 1929, plaintiff cut 57,483,080 feet board measure of yellow and sugar pine. That quantity of timber, at 40¢ a thousand feet board measure, totals \$22,993.23.

From April 1, 1929, to March 31, 1930, plaintiff cut 54,448,480 feet board measure of yellow and sugar pine. That quantity of timber, at 40¢ a thousand feet board measure, totals \$21,779.39.

The total quantity of yellow and sugar pine cut by the plaintiff during the contract periods beginning with April 1, 1928, and ending March 31, 1930, totalled 111,931,560 feet board measure. That quantity of timber at 40¢ a thousand feet board measure, totals \$44,772.62.

18. During the period between January 14, 1927 (the date on which the Assistant Secretary of the Interior approved the acceptance by the plaintiff of the assignment from the Modoc Pine Company of the contract of October 30, 1920), and March 31, 1930 (the end of the period during which the 40¢ increase remained effective), plaintiff paid an average stumpage of \$5.28 per thousand feet board measure.

On January 22, 1927, the Assistant Secretary of the Interior approved the assignment to the plaintiff of a contract dated July 30, 1924, for the purchase by the Fremont Land Company of timber on the North Marsh Timber Unit in the Klamath Indian Reservation. The initial price stipulated in the contract for the first period ending March 31, 1928, for yellow pine and sugar pine was \$5.53. The contract provided for a fixed increase in the stumpage rates during the remaining three-year periods, specified therein. A 12% increase in price became effective April 1, 1928, advancing the price for yellow and sugar pine to \$6.19. In the acquisition of this contract, plaintiff paid a premium above the original stumpage price of \$5.53 stipulated in the contract.

19. During the period of 14 years prior to 1931, the Indian Service made an exhaustive investigation and study of the comparative production costs and selling price trends of timber within the Klamath Region, for the purpose of establishing a basis which would guide the Commissioner of Indian Affairs in determining the stumpage rates to be fixed by him during each of the three-year periods specified in the contract.

The area specified in the contract of October 30, 1920, as "Southern Oregon and Northern California" has always been understood, by lumbermen and engineers familiar with the locality, as embracing the Klamath Region. Speaking generally, this region is a definite economic unit in the lumber industry, and is composed primarily of Klamath County, Oregon, and small parts of Lake County, Oregon, and Modoc County, California. Topographically, this economic unit embraces the Klamath Basin which is bounded on the west by the Cascade Mountains; on the north by the divide between the waters of the Williamson and Deschutes Rivers; on the east by the Lake View Basin, and on the south by the Lava Beds of Northern California. The principal producing center of this region is Klamath Falls, Oregon. Lumber manufacturing operations are, comparatively speaking, centralized within the vicinity of that place and all the larger companies located there operate under similar physical and industrial conditions, and distribute their products through the same markets.

During each year from 1917 to 1931, the Indian Service had compiled statistical information covering the market price and production cost trends of lumber in the Klamath Region, which data had been abstracted from the certified operating statements from the principal lumber-producing companies operating within the Klamath Region. These certified statements were submitted to the Commissioner of Indian Affairs by the various companies competing for timber within the Klamath Reservation and form a part of the permanent record of his office.

To assist the Commissioner of Indian Affairs in making the stumpage price adjustments under the contract that official assigned an expert timber valuation engineer to make a special study of pro-

duction costs, and of sale price trends of lumber at the mills within the Klamath Region, and to submit yearly reports showing the trends of such costs and sales prices within that region. Such reports were made for the years 1920, 1923, 1924, 1926, 1927, 1928, 1929, 1930, and 1931. This valuation engineer was thoroughly familiar with the timber within the area covered by the contract, having been assigned to survey that timber as early as 1913. All the yearly reports touching the price trends of timber within the Klamath Region were made to the Commissioner of Indian Affairs by this engineer. The reports are comprehensive, and give effect to every factor affecting the trend of production costs and selling prices.

20. The statistical studies and reports made by the Valuation Engineer showed that during the contract period the average mill run net wholesale value of pine lumber within the Klamath District fluctuated from a low of \$17.49 in 1917, to a high of \$42.44 in 1920. Sales prices remained at comparatively high levels from that year through to 1925, and thereafter gradually declined to \$24.73 in 1927, rising again to \$25.50 in 1929.

Production costs within the same area showed a corresponding fluctuation during the period in question, rising from a low of \$15.33 per M feet in 1917, to a high of \$30.70 per M feet in 1920. Production costs remained at a comparatively high level through 1923, the level for that year being \$28.01 per M feet, and gradually declined thereafter to \$23.38 in 1928, again rising to \$25.07 in 1929.

From 1917 to 1929 the stumpage prices of pine timber in the open competitive market in this area ranged from a low of \$3.25 to a high of \$8.00 per M feet. The record shows that the prices of stumpage within the pertinent period of the contract fluctuated greatly. The graph evidencing the trend of stumpage prices within this competitive area reflected only a comparatively slight increase in prices during and immediately following the years of highest sales price for lumber, namely, 1919 to 1923. It showed frequent recessions in the stumpage price trend during that period. In 1917 the average sale price of stumpage within the competitive area was \$3.44, whereas 10 years later the average sale price of stumpage within the Klamath Region was \$7.64 per M feet.

21. The average mill run, net wholesale prices of California white and sugar pines, applicable to the Forest Lumber Company contract, for the respective three-year periods here involved, were, as shown by the defendant's "Exhibit R," page 82, as follows: For the years 1917, 1918, and 1919, \$23.10; for the years 1921, 1922, and 1923, \$30.26; and for the years 1924, 1925, and 1926, \$27.00.

22. The contract was to extend from October 30, 1920, to March 31, 1939. It specified that the prices for pine stumpage for the period ending March 31, 1924, should be \$5.08 per thousand feet board measure, and for the three-year periods of the contract term beginning April 1, in the years 1924, 1927, 1930, 1933, and 1936, such prices as

should be fixed by the Commissioner of Indian Affairs, in the manner therein prescribed.

The parties agreed that the rates to be fixed by the Commissioner for each of the three-year periods specified should be determined, after a careful consideration of the cost of logging operations and lumber manufacture, in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California regions, during the three years preceding January 1 of each year in which the new rates were to be fixed.

The contract provided that such new rates should lie wholly within the discretion of the Commissioner of Indian Affairs; that a hearing should be afforded the purchaser, upon written request made at least 15 days before the date upon which the new stumpage rates were to be made effective; and that the new schedule should be determined, and notice given to the purchaser not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936.

As a basis of comparison in fixing the readjusted prices under the contract it was agreed therein that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three-year period ending January 1, 1920, was \$22.50 for yellow pine.

The only limitation imposed by the contract on the discretionary authority of the Commissioner, in the matter of fixing the stumpage rates to be paid during the three-year periods specified in the contract, was the provision that such stumpage rates—

“* * * shall not exceed 50% of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924. In the discretion of the Commissioner, a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit; Provided that the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract.”

23. The first price adjustment period stipulated in the contract was to commence on April 1, 1924. On February 25, 1924, the Commissioner wired the Chief Clerk, Klamath Agency, Oregon:

“Exhaustive consideration all factors involved indicates no increase in stumpage prices should be made on Cliff Boundary, Solomon Butte, Little Sprague, Chiloquin, and Calimus-Marsh Units. Advise purchasers.”

The Williamson River Logging Company, one of plaintiff's predecessors in title, had, from the inception of the contract, experienced financial difficulties, and was in default in cutting the required quantities of timber under the contract. Shortly thereafter, the affairs of that company underwent a reorganization, and in 1925 the

contract was assigned to the Modoc Pine Company, plaintiff's immediate predecessor in title.

Following the approval by the Assistant Secretary of the Interior on January 14, 1927, of the assignment of the contract from the Modoc Pine Company to the plaintiff, the question respecting the readjustment of stumpage prices for the second contract period, beginning April 1, 1927, came before the Commissioner.

As required by the contract, plaintiff was notified by the Commissioner on February 25, 1927, that commencing April 1, 1927, the price of pine stumpage on the Calimus-Marsh Unit would be increased by \$1.00 per thousand feet board measure, but that the increase would not become effective until April 1, 1928. The action of the Commissioner in suspending until April 1, 1928, the price increase made effective by him under the contract on April 1, 1927, was taken because of the depressed condition of the lumber market in that year.

43 On March 28, 1928, the Commissioner notified plaintiff that he had reduced the increased price of pine stumpage on the Calimus-Marsh Unit from \$1.00 to 40¢ effective April 1, 1928. Plaintiff protested that the proposed increase was not warranted, in view of conditions then existing in the lumber industry, stating that the company was operating at a loss. Plaintiff also submitted to the Commissioner data to support its contention that logging conditions and the quality of timber on the Calimus-Marsh Unit would not enable it to operate at a profit.

On February 26, 1930, the Commissioner notified plaintiff that there would be no increase on April 1, 1930, on the Calimus-Marsh Unit, above the price of \$5.48 then being paid for pine stumpage and that he would advise plaintiff later whether further study seemed to justify a reduction in that price.

On April 29, 1930, the Commissioner notified plaintiff that after a re-cruise of the timber, and a thorough examination of all factors affecting logging operations and the quality of timber remaining on the Unit, he had concluded that the interests of the Klamath Indians would be fully protected through a reduction of 40¢ from the existing price, effective April 1, 1930, making the stumpage price payable for yellow and sugar pine after that date \$5.08, which was the price originally fixed in the contract. Plaintiff was expressly advised, however, that this action would not relieve it from the increase of 40¢ per thousand feet for yellow and sugar pine from April 1, 1928, to March 31, 1930.

Following the passage of permissive legislation the contract was modified on February 21, 1934, and the price of pine stumpage reduced to \$3.00 per thousand feet. The modification of the contract was consented to by the Klamath Indians in General Council. It was approved by the Secretary of the Interior on March 3, 1934.

24. The comparative cost studies, conducted by the Valuation Engineer and his assistants under the direction of the Commissioner of

Indian Affairs, indicated that prior to 1925, sales of stumpage within the Klamath Reservation had remained at reasonably conservative levels. Beginning with 1925, and thereafter, the prices within
44 that region rose to abnormally high levels, due primarily to the keen competition for such stumpage. The initial price for pine stumpage, under the contract, was \$5.08, and was to remain effective during the contract period ending March 31, 1924. That initial price of \$5.08 remained effective until April 1, 1928, at which time it was increased by 40¢, making the stumpage price, effective on that date, \$5.48 per thousand feet. That increase was later reduced, and, effective April 1, 1930, the price was again fixed at \$5.08 per thousand feet for yellow and sugar pine.

During the same period stumpage prices for timber within the Klamath Region had risen, in some instances to \$8.00 per thousand feet, in 1926 and 1927. The average stumpage price, under competitive bidding, during 1926 and 1927 was \$7.63. In 1928 that average dropped to \$5.00, rising again to \$6.92 in 1929.

25. The sale of timber upon the allotted and unallotted lands of the Klamath Indian Reservation was authorized by the act of June 25, 1910, Sections 7 and 8 (36 Stat. 855, 857). Regulations promulgated by the Secretary of the Interior, as required by that Act, prescribed the procedure to be followed in the sale of the timber and the disposition of the proceeds thereof.

The Secretary of the Interior also approved forms of advertisement and contracts to be used by the respective superintendents of Indian reservations in the sale of timber, upon either unallotted or allotted lands, which forms were made a part of the regulations. The standard Form of Contract was used in making the contract involved in this suit. The form of contract of October 30, 1920, except for minor modifications and a provision for a fixed 12% increase in the price of stumpage every three years, had been used in every sale of timber on Indian reservations since the passage of the act of June 25, 1910. Contracts for the sale of timber from unallotted lands of Indian reservations made prior to the act of June 25, 1910, were similar in form to the contract of October 30, 1920, so far as relates to the designation of the parties thereto.

The practice followed by the Bureau of Indian Affairs in the
45 sale of timber on Indian reservations under the act of June 25, 1910, was uniform. Whenever the Commissioner of Indian Affairs determined that timber on Indian reservations should be sold, the procedure was for the Superintendent of the Indian reservation to advertise definite units of timber for sale, accept bids, and forward an abstract of such bids to the Commissioner of Indian Affairs in Washington, together with his recommendation respecting the award to be made. The contract was then prepared in the form prescribed by the regulations and signed by the Superintendent on behalf of the tribal Indians. When signed by the purchaser, the contract was forwarded by the Superintendent to the Commissioner of Indian

Affairs for approval, either by him or by the Secretary of the Interior, depending upon the value of the timber involved in the contract. Under the provisions of the contract of October 30, 1920, the purchaser agreed that within six months from the date of approval of the contract it would enter into approved separate contracts of purchase with those Indians holding allotments within the sale area covered by the tribal contract who desired to sell their timber thereon. These allotment contracts were subject to the same procedure with respect to the making thereof, and prices to be paid for the timber, as was followed in the making of the tribal timber contract. Contracts for the sale of timber, either upon unallotted or allotted lands, were made under the supervision of the Secretary of the Interior. According to the record, no contracts for the sale of Indian tribal timber were ever made in the form and manner prescribed by R. S. 2103. Such contracts have always been made in substantial compliance with the form of contract made by the purchaser herein on October 30, 1920.

26. The contract of October 30, 1920, was to be performed prior to March 31, 1939. The record does not disclose the amounts of money already paid under the contract by the plaintiff and its predecessors in interest.

The act of March 3, 1883 (22 Stat. 582, 590), as amended by the act of May 17, 1926 (44 Stat. 560), provided that the proceeds of the sales of timber on any Indian reservation, except those of the Five Civilized Tribes, should be covered into the Treasury under the caption "Indian moneys, proceeds of labor," for the benefit of such tribes, and under such regulations as the Secretary of the Interior should prescribe.

The act of March 2, 1887 (24 Stat. 449), vested in the Secretary of the Interior discretionary authority to expend such proceeds for the benefit of the tribal Indians concerned.

Section 27 of the act of May 18, 1916 (39 Stat. 123, 158), prescribed the procedure to be followed with respect to the expenditure of tribal Indian funds covered into the Treasury and deposited to the credit of the tribes, pursuant to the acts of March 3, 1883, and March 2, 1887.

The act of March 2, 1907 (34 Stat. 1221), authorized the Secretary of the Interior, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he might deem to be capable of managing his or her affairs, and to cause to be allotted to such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which said Indian was a member, and to place such pro rata share of such fund to the credit of the Indian concerned, upon the books of the Treasury, and subject to the order of such Indian.

The acts of April 30, 1908 (35 Stat. 70), and June 25, 1910 (36 Stat. 855), authorized any United States Indian agent, or superintendent, to deposit Indian moneys, individual or tribal, coming into

his hands as custodian, in such private banks as he might select, subject, however, to the requirement that such banks execute a bond in the form approved by the Secretary of the Interior, to safeguard such funds.

The act of May 25, 1918 (40 Stat. 561), authorized the Secretary of the Interior to withdraw from the Treasury such tribal funds as were susceptible of segregation, and to credit an equal share thereof to each member of that tribe, and to deposit the funds in private banks, subject to withdrawal, for payment to the individual owners, or expenditure for their benefit.

27. The record discloses that all moneys paid by the purchaser to the Superintendent of the Klamath Indian School for the timber cut by it under the tribal timber contract of October 30, 1920, and the several allotment contracts made thereunder with individual Indian owners, less the sum of 8% thereof, were deposited by the Superintendent, either in private State banks or in the Treasury of the United States, to the credit of the tribal or individual Indians concerned. The contract of October 30, 1920, and the several contracts made by the purchaser with the holders of allotments were administered as one contract, and all the proceeds arising under such contracts were paid to the Superintendent. No part of the net proceeds inured to the benefit of the United States. The proceeds arising under the tribal contract were deposited in the Treasury under an account designated "Indian Moneys, Proceeds of Labor, Klamath Indians."

The sum of 8% was deducted from the proceeds paid by the purchaser to the Superintendent for the timber, in accordance with paragraph 21 of the regulations approved March 17, 1917, and the provisions of Section 1 of the act of February 14, 1920. These acts authorized the Secretary of the Interior, under such regulations as he might prescribe, to charge a reasonable fee for the work incident to the sale of timber, or in the administration of Indian forests, to be paid from the proceeds of sales. This 8% was deducted by the superintendent from the gross proceeds and held by him in a separate account, which account was used to defray the expenses incident to administering the contract of sale and the Indian forests. It was deposited in the Treasury, to the credit of the United States, under the caption "Miscellaneous Receipts."

Upon receipt of proceeds from the purchaser the Superintendent of the Klamath Reservation made a credit upon books kept in his office at the Klamath Agency in Oregon, showing the amount of money payable to the Klamath Tribe of Indians, as well as the individual Indian allottees concerned. This action was based upon scale reports made by civil service employees of the United States attached to the Klamath Indian Agency. The money belonging to individual Indian allottees was deposited in private banks, in a lump sum, to the credit of the Superintendent or disbursing officer of the Indian Agency, who held such moneys in trust for the respec-

48 tive Indian allottees. The banks selected as depositaries for individual Indian moneys kept no record of the individual Indian accounts. These trust funds were subject to withdrawal by the Superintendent of the reservation, and were distributed by him to the individual owners thereof, under regulations prescribed by the Commissioner of Indian Affairs and approved by the Secretary of the Interior. In cases involving large sums of money the matter was submitted to the Commissioner of Indian Affairs for authorization to distribute such moneys.

28. Early legislation vested unlimited discretion in the Secretary of the Interior with respect to the expenditure of moneys credited to the tribal Indians. Section 27 of the act of May 18, 1916 (39 Stat. 123, 159), restricted this discretion but authorized the Secretary of the Interior to expend such funds for "equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments." During the period from 1922 to 1934, per capita payments in excess of \$6,200,000 were made direct to the Klamath Indians on account of the proceeds derived from the sale of timber on that reservation. Competent Indians were paid their share of the per capita payments directly. The per capita shares of other Indians were deposited to their accounts, and the expenditure thereof was subject to departmental regulations.

Prior to 1927 it was the practice for the Superintendent of the Klamath Indian Reservation to submit accounts of all the Indian moneys in his possession to the Office of the Bureau of Indian Affairs, and it was not then the practice of the General Accounting Office to review such reports. However, subsequent to 1927, the General Accounting Office has reviewed the accounts of superintendents concerning Indian moneys in their possession.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of \$44,772.62.

49 It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of forty four thousand seven hundred seventy two dollars and sixty-two cents (\$44,772.62):

Opinion

WILLIAMS, Judge, delivered the opinion of the court:

Plaintiff in this suit seeks to recover the sum of \$44,772.62; alleged to have been illegally collected by the defendant as a part of the contract price for certain timber sold by the defendant to the plaintiff.

On August 10, 1920, pursuant to act of June 25, 1910 (36 Stat. 855), the Assistant Secretary of the Interior approved a form of contract and pertinent regulations, and also a form of advertisement, for the

sale of approximately 450,000,000 feet of timber located on about 67,000 acres of what was known as Calimus-Marsh Unit, Klamath Indian Reservation, Oregon. The advertisement required that sealed bids, in duplicate, be addressed to Klamath Indian School, Klamath Agency, Oregon. Each bidder was required to state in his bid the price that he would pay per M feet for yellow pine, sugar pine, incense cedar, and for other kinds of timber cut and scaled prior to April 1, 1924. The advertisement stated that the prices, subsequent to April 1, 1924, were to be fixed by the Commissioner of Indian Affairs, for three-year periods.

On October 26, 1920, Williamson River Logging Company, in response to the invitation for bids, made its proposal, addressed to the Superintendent, Klamath Indian School, Klamath Agency, Oregon, for the purchase of yellow pine, sugar pine, and incense cedar at \$5.08 per M feet; and for all other species at \$1.85 per M feet. On October 30, 1920, a contract was signed by Williamson River Logging Company. On July 25, 1922, it was approved by the Assistant Secretary of the Interior.

On March 19, 1925, Modoc Pine Company acquired the contract by assignment from Williamson River Logging Company. On April 3, 1925, this assignment was approved by the Superintendent of the Klamath Agency, Klamath, Oregon, and on April 22, 1925, by the Assistant Secretary of the Interior.

On August 10, 1926, plaintiff acquired the contract by assignment from the Modoc Pine Company. This assignment was approved by the Superintendent of the Klamath Agency, Klamath Falls, Oregon, on December 27, 1926, and by the Assistant Secretary of the Interior on January 14, 1927.

The contract provided that the timber covered in the contract should be cut and removed by the purchaser prior to March 31, 1939, and that the purchaser should pay for such timber its value as specified in the contract, as follows:

"(a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so-called 'bull pine'), sugar pine, and incense cedar; and one dollar and eighty-five cents for other species.

"(b) For each of the three year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936, such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described."

The contract provides the precise method for an adjustment by the Commissioner of Indian Affairs of the stumpage rates to be paid by plaintiff for the three-year period beginning April 1, 1924, and also for each of the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, as follows:

"For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the superintendent and

the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents (\$22.50) for yellow pine (including so-called 'bull pine'), sugar pine, and incense cedar, and seventeen dollars (\$17.00) for other species.

"In determining the stumpage rates to be designated for all timber scaled during the three-year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of twenty-two dollars and fifty cents (\$22.50) and seventeen dollars (\$17.00) stipulated in the preceding paragraph as basic values, and the cost of logging operations and lumber manufacture
51 during the said three years will be compared with the cost of such operations and manufacture during the three-year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three-year period directly preceding January 1, 1924."

The first period for which the Commissioner of Indian Affairs could increase stumpage rates provided in the contract was for the three-year period beginning April 1, 1924. However, he made no increase in stumpage rates for that period and notified plaintiff's predecessor to that effect on February 25, 1924. The next three-year period for which an increase could be made, if the facts warranted it, was that beginning April 1, 1927. The Commissioner on February 25, 1927, notified plaintiff that stumpage prices provided in the contract would be increased \$1.00 per M feet to become effective April 1, 1928. The plaintiff upon the receipt of this notice immediately wrote the Commissioner of Indian Affairs protesting against the increase, saying that on the basis of the then stumpage price of \$5.08 per M feet it had lost \$1.02 per M feet for the year 1926, and that there was nothing in the then market situation to justify the increase. This protest was renewed on January 19, 1928, by telegram, in which plaintiff pointed out in great detail its reasons for protesting the increase and requested that it be given a hearing. Following this telegram there was considerable correspondence between the plaintiff and the Commissioner respecting the general conditions, and the quality and quantity of timber cut and to be cut. On March 24, 1928, the Commissioner informed the plaintiff by telegram that the increase of \$1.00 per M feet would be reduced to 40 cents per M feet effective April 1, 1928. The increased price went into effect April 1, 1928, and remained in effect to March 31, 1930, during which period plaintiff cut 111,931,560 feet of yellow and sugar pines. That quantity at the increased rate of 40 cents per M feet amounts to \$44,772.62, the amount involved in suit.

52 The authority of the Commissioner of Indian Affairs to make an increase of 40 cents per M feet in the stumpage rates during the period April 1, 1928, to March 31, 1930, constitutes the sole issue in the case. The relevant facts bearing on this issue, while apparently somewhat complicated, are in fact quite simple. Although, in the language of the contract, "the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs," the contract places an important limitation on his discretionary power to increase stumpage prices by the provision:

"Any advance in stumpage prices prescribed by the Commissioner for the three-year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924."

The limitation on the authority of the Commissioner to make advance in stumpage rates for the three-year period beginning April 1, 1924, is likewise applicable to each of the subsequent three-year periods of the contract by the following provision:

"For the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, re-adjustment of stumpage prices may be made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three-year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three-year period."

While the Commissioner in determining the stumpage rates to be designated for timber cut during the three-year period beginning April 1, 1927, was required by the contract to compare the cost of logging operations and lumber manufacture during the three-year period preceding April 1, 1927, with the three-year period preceding April 1, 1924, for the purpose "of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacture operations" during the three-year period directly preceding April 1, 1927, he was without authority, whatever such

53 comparison might show, to increase the price of stumpage for the coming three-year period more than 50% of the net increased sales price of lumber for the current three-year period over the price of lumber for the preceding three-year period. There was an actual decrease in the wholesale price of lumber f. o. b. mills during the three-year period beginning April 1, 1924, over the wholesale price of lumber during the preceding three-year period. This is established by proof adduced by the defendant in its Exhibit "R," page 82, showing that the wholesale price for M feet in the Klamath District was \$30.26 for the three-year period April 1921, 1922, and 1923, and that the wholesale price for the three-year period 1924, 1925, and 1926 averaged \$27.00 per M feet. This fact is recognized by the defendant in its brief:

"At the outset we concede and the record shows that during the pertinent three-year periods, namely 1924-1926, there was a decrease in the wholesale price of lumber as compared with the preceding three-year period specified in the contract, namely, 1921-1923. The defendant adduced proofs to establish these facts."

In view of these conceded facts, it is clear that the Commissioner of Indian Affairs was without authority to make an increase in stumpage prices for the period beginning April 1, 1927. He was not only without authority to make an increase in stumpage prices for that period, but he was prohibited from so doing by the plain provisions of the contract. The defendant, however, contends that the Commissioner of Indian Affairs and plaintiff, particularly plaintiff's predecessors in title, had throughout the performance of the contract, and before any controversy respecting it had arisen, put a practical interpretation upon the contract at variance with its terms. It is contended that this practical interpretation is controlling and authorized the Commissioner to make the price increase in question. It is urged that the unanticipated economic exigencies that followed the post-war period and which continued for several years thereafter, and also the financial difficulties suffered by plaintiff's predecessors in title, made it necessary for the Commissioner in dealing with plaintiff and its predecessors to depart from the literal terms

54 of the contract and put upon it a practical interpretation in order to work out substantial justice between the purchaser and the Indians. It is particularly urged that under the strict terms of the contract the Commissioner could have made a substantial increase in stumpage prices for the period beginning April 1, 1924, but that because of the practical interpretation put upon the contract by the parties he made no such increase, and by so doing departed from the strict terms of the contract in order to benefit plaintiff. The defendant says that if the practical interpretation put upon the contract for the benefit of plaintiff and its predecessors can be sustained as a valid exercise of the discretion vested in the Commissioner, then it follows necessarily that the discretionary action of the Commissioner in increasing the price of stumpage by 40 cents per M feet for the benefit of the Klamath Indians, effective April 1, 1928, was likewise a valid exercise of the discretion vested in him by the contract.

We think the contention of the defendant is without merit. It is true that the Commissioner of Indian Affairs made certain concessions to plaintiff's predecessors because of financial difficulties and other obstacles encountered by them in the early stages of performance of the contract. These concessions, however, had no relation to stumpage prices to be paid under the contract and have no materiality to the issue presented. There is no evidence whatever in the record to justify the contention that the Commissioner of Indian Affairs departed from the strict terms of the contract in any way in not advancing stumpage prices to plaintiff's predecessors for the three-year period beginning April 1, 1924. The mere fact that the wholesale

prices of lumber during the preceding three-year period were such that the Commissioner was authorized to advance stumpage prices for the period beginning April 1, 1924, had he seen fit to do so; does not show that his action in not making an increase was a concession to plaintiff not contemplated in the contract. Many factors other than the wholesale price of lumber necessarily entered into the Commissioner's determination to increase or not to increase stumpage prices

for the period beginning April 1, 1924. It must be assumed
55 the Commissioner performed his duty in good faith and that his decision not to increase stumpage prices for the period was fully justified by the facts on which his determination was based. Furthermore, what the Commissioner may have done in 1924 is immaterial to the issue in this case. The contract divides the time in which the contract is to be performed into periods of three years each. Price adjustments are to be made in the same manner for each of the periods. The determination of the new rates to be fixed for each adjustment period "lie wholly within the discretion of the Commissioner of Indian Affairs" with the sole limitation that no increase shall be made in excess of 50% of the wholesale increase in the value of lumber during the preceding three-year period over the value of lumber during the designated three-year period preceding. Each three-year period stands on its own bottom, and the fact that the Commissioner in his discretion declines to make an increase in stumpage prices for a period when he had authority to do so has no relevancy whatever to the price adjustment made by him for any other three-year period provided in the contract. The contention, therefore, that the increased stumpage price of 40 cents per M feet, here involved, was a valid exercise of the discretion vested in the Commissioner of Indian Affairs by the contract, is not sustained.

The defendant further contends that the contract sued upon is not a contract with the United States within the meaning of section 145 of the Judicial Code, and that the suit is, therefore, not maintainable under the Court's general grant of jurisdiction. It is urged that in making the contract the defendant's officials were merely acting for the Indians in their behalf and for their interest, and that consequently there was no responsibility on the part of the defendant for the performance of the contract. In other words it is contended the contract is not a contract by the defendant but a contract of the Klamath Indians. The contract recited it was made by "the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians," and that the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School,

State of Oregon, for the use and benefit of the Klamath Tribe
56 of Indians." The contract referred to the Klamath Indians as the "party of the first part" which agreed to sell to the plaintiff certain timber and the final agreement was that the plaintiff should pay to the Superintendent of the Klamath Indian School "for the use and benefit of the Klamath Tribe of Indians" the value of the timber at prices fixed in the contract. But that the Government was

of the agent of the Indians is clear. An agent is one who acts for another under authority given by the other party. The Government did not act under any authority given by the Indians. It acted in its own right somewhat in the manner that a guardian might act for a ward. The contract was executed by the Superintendent of the Klamath Indian School by authority of law. In what he did he was acting for the Government, and in what the Government did it was acting under its own rights and powers. It was not authorized by the Indians to make the contract nor was it approved by them, it was approved by the Secretary of the Interior. While the Indians had a beneficial interest in the timber to be cut they lacked power to dispose of it, and any contract made by them would not be binding; and, as it would not be binding upon the Indians, it would not be binding upon the other party and would be merely a nullity. The contract was executed and approved by the officials of the defendant in strict accordance with the laws of the United States. Undoubtedly, the contract is a contract of the defendant within the meaning of section 145 of the Judicial Code.

From what has been said it follows that the plaintiff is entitled to recover. Judgment is therefore awarded the plaintiff in the sum of \$44,772.62. It is so ordered.

WHALEY, Judge; LITTLETON, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

V. Judgment

At Court of Claims held at the City of Washington on the 12th day of January, A. D. 1938, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of forty-four thousand seven hundred seventy-two dollars and sixty-two cents (\$44,772.62).

VI. Proceedings after entry of judgment

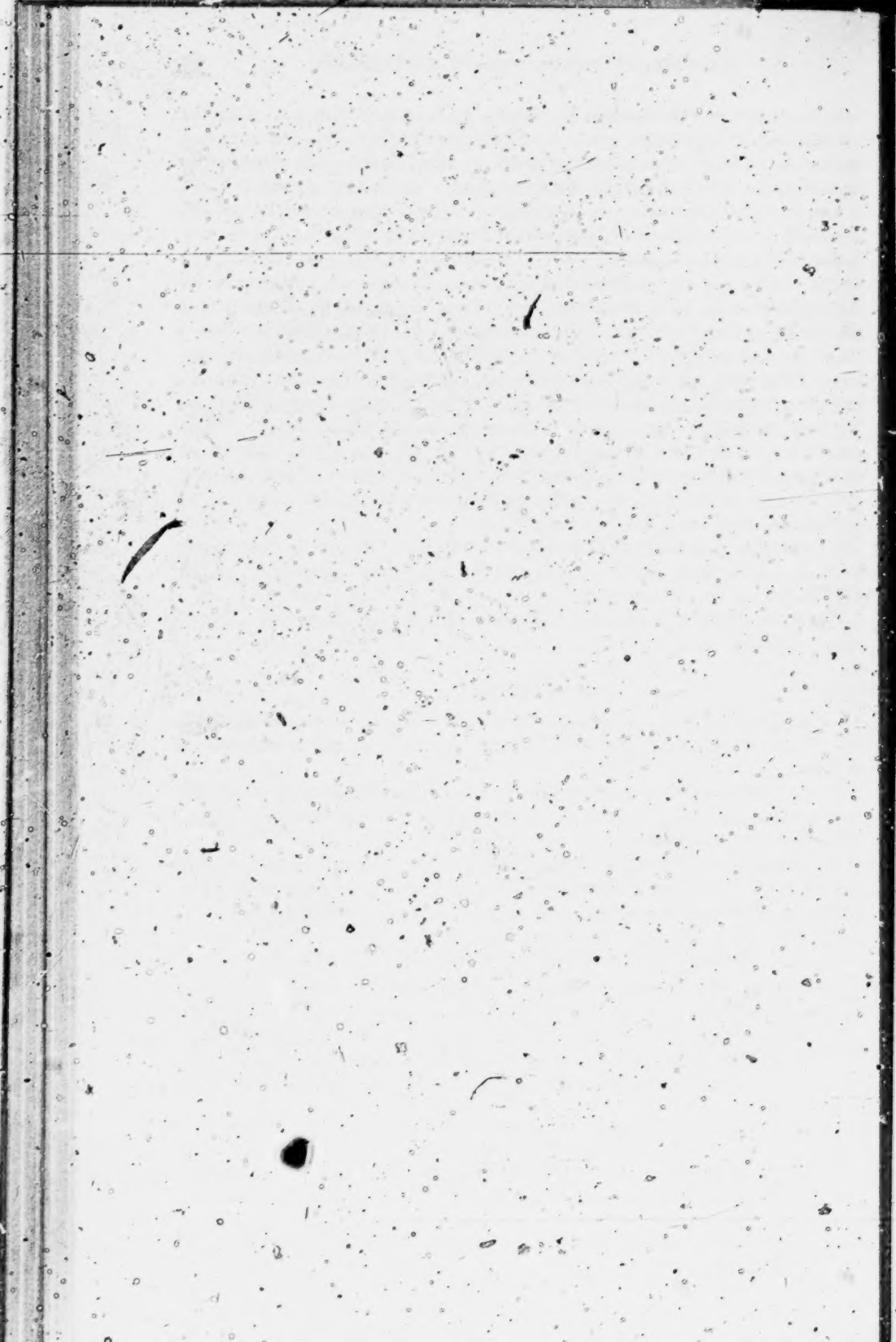
On March 10, 1938, the defendant filed a motion for extension of time to April 13, 1938, within which to file a motion for a new trial. On March 12, 1938, said motion was allowed by the Court.

On April 13, 1938, the defendant filed its motion for a new trial. On May 2, 1938, the court entered the following order on said motion:

ORDER

It is ordered this 2d day of May 1938, that the defendant's motion for new trial be and the same is overruled.

[Clerk's certificate to foregoing transcript omitted in printing.]



Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.